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No. 79-1637

In the Supreme Court of the United States

OCTOBER TERM, 1979

J. P. STEVENS & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A30-A32) is reported at 612 F. 2d 881. The decision and order of the National Labor Relations Board (Pet. App. A1-A28) are reported at 240 N.L.R.B. No. 35.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1980. A petition for rehearing was denied on February 12, 1980 (Pet. App. A33-A34). The petition for a writ of certiorari was filed on April 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in light of petitioner's repeated and present violations of the National Labor Relations Act, the Board reasonably exercised its remedial authority in ordering petitioner to accord union representatives, under specified circumstances, access to all of its plants for a two-year period.

STATEMENT

1. The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act (the "Act"), 29 U.S.C. 158(a)(1), when, during the Union's[1] organizing campaign at petitioner's Tifton, Georgia plant in May and June 1976, two supervisors on three separate occasions coercively interrogated employees about their own and other employees' union activities and threatened employees with more onerous working conditions if they selected the Union as their representative (Pet. App. A1, A14-A15, A16-A18).

As a remedy for these unfair labor practices, which petitioner does not now challenge, the Board issued an order requiring petitioner not only to cease and desist from the unfair labor practices in question and to post a notice at the Tifton plant and petitioner's other plants, but also, *inter alia*, to take the following action at each of its plants for a two-year period (Pet. App. A5-A6):[2]

> (e) Upon request of the Union, * * * immediately grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are customarily posted, * * * for a period of 1 year from the date of request.

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[1]Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC.

[2]In ordering these additional remedies, the Board modified the recommended order of the Administrative Law Judge, pursuant to exceptions filed by the Union (Pet. App. A3).

(f) In the event * * * [petitioner] convenes any group of employees at any of [its] plants and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech and, upon request of said representatives, permit one of them to address the employees for the same amount of time as [petitioner's] address.

(g) If * * * the Board schedules an election in which the Union participates at any of [petitioner's] plants, then, upon request by the Union, afford at least two union representatives reasonable access to each of [those] plants and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be within 10 working days before but not within 48 hours prior to any such election.

* * * * *

(i) * * * upon request of the Union, without delay, permit a reasonable number of union representatives access for reasonable periods of time to all its canteens and rest and other nonwork areas, including parking lots, within each of its plants, for the purpose of communicating orally and in writing with the employees in such areas during changes of shift, breaks, mealtimes, or other nonwork periods. * * *

The Board explained that these additional remedies were necessary in view of petitioner's "long history of violations of employee rights and its flagrant disregard of Board

decisions and court orders,[3] and for the reasons set forth in *J. P. Stevens & Co., Inc.*, [239 N.L.R.B. No. 95 (Dec. 12, 1978) (*Stevens XIX*)]" (Pet. App. A3).[4]

2. In a *per curiam* opinion, the court of appeals enforced the Board's order (Pet. App. A30-A32). Rejecting petitioner's challenge to the scope of the order, the court found that "the Board acted within its discretion to remedy those unfair practices established in the record" (Pet. App. A32). The court denied petitioner's petition for rehearing and denied its motion to consolidate for rehearing en banc the present case with other cases involving petitioner currently pending before the court (Pet. App. A33-A34). Petitioner's motion for a stay of mandate pending the filing of a petition for a writ of certiorari was also denied by the court (Pet. App. A35), as was a subsequent motion for reconsideration (Pet. App. A36). On April 28, 1980, this Court likewise denied petitioner's application for a stay.

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[3]The Board cited as examples *NLRB* v. *J. P. Stevens & Co., Gulistan Division*, 538 F. 2d 1152 (5th Cir. 1976) (*Stevens XVII*), and *NLRB* v. *J. P. Stevens & Co.*, 563 F. 2d 8 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (*Stevens XVIII*), in which petitioner had been found in civil contempt of court decrees enforcing Board orders.

[4]In *Stevens XIX*, which is pending before the Fourth Circuit on petitions to review and enforce the Board's order (Nos. 79-1247 and 79-1254), the Board ordered the same broad access remedies in light of petitioner's unlawful refusal to bargain with the Union, which had been certified as the employees' representative at petitioner's Roanoke Rapids, North Carolina plant. The Board explained that, in view of petitioner's past history of flagrant and persistent violations of the Act which were directed from its central offices and publicized at the other plants, it was "appropriate to afford the Union * * * access to all plants and employees, in the hope that the Union will in some measure be able to counteract the predictably adverse emanations which have flowed from what is now more than three years of fruitless bargaining at Roanoke Rapids." 239 N.L.R.B. No. 95 at 80.

ARGUMENT

Section 10(c) of the Act, 29 U.S.C. 160(c), accords the Board wide discretion to fashion appropriate remedies for unfair labor practices. "[T]he Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). See, *e.g.*, *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 316 (1979); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964).[5] A Board order should not be overturned "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943). The reviewing court "may decide only whether, under the pertinent statute and relevant facts, the [agency] made 'an allowable judgment in [its] choice of the remedy.' " *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 189 (1973), quoting *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612 (1946). In this case, the court of appeals properly applied these standards in concluding that the Board did not abuse its remedial authority in granting the Union access to petitioner's plants. Further review of this fact-specific question by this Court is therefore unwarranted.[6]

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[5]In *Detroit Edison Co.* v. *NLRB*, *supra*, the Court refused to enforce a Board order requiring an employer unconditionally to disclose to the union an aptitude test battery and answer sheet. 440 U.S. at 312-317. The Court found that the Board's remedy did not sufficiently protect "the Company's undisputed and important interests in test secrecy." *Id.* at 316. Petitioner points to no comparable legitimate business interest here. Indeed, pursuant to the 1977 decree in *Stevens XVIII*, petitioner has permitted union access in its numerous Carolina plants, and there is no showing that such access has interfered with the operation of petitioner's business.

[6]To the extent that petitioner contends (Pet. 11, 16) that the Board's limited order trenches on constitutionally protected property rights, its claim is without merit. See, *e.g.*, *Hudgens* v. *NLRB*, 424 U.S. 507, 521-523 (1976). In any event, petitioner failed to raise this claim before the Board and did not raise it in the court of appeals except in its motion for

1. Petitioner has engaged in a "massive multistate compaign to prevent unionization of its Southern plants." *J. P. Stevens & Co.* v. *NLRB*, 417 F. 2d 533, 537 (5th Cir. 1969) (*Stevens V*).[7] As the Second Circuit has observed, petitioner "has earned * * * its reputation as the 'most notorious recidivist' in the field of labor law." *NLRB* v. *J. P. Stevens & Co.*, 563 F. 2d 8, 13 (1977) (*Stevens XVIII*). Indeed, petitioner does not contend otherwise. Rather it maintains (Pet. 7-9) that, since the entry of the last contempt order against it in 1977, it has not "*violated any commitments*

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reconsideration of the court's denial of its motion for a stay of mandate. Accordingly, this contention is not properly before the Court. See *Detroit Edison Co.* v. *NLRB*, *supra*, 440 U.S. at 311 n.10; *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); 29 U.S.C. 160(e).

[7]See *J. P. Stevens & Co.*, 157 N.L.R.B. 869 (1966), enforced with modifications, 380 F. 2d 292 (2d Cir.), cert. denied, 389 U.S. 1005 (1967) (*Stevens I*); *J. P. Stevens & Co.*, 163 N.L.R.B. 217, enforced with modifications, 388 F. 2d 896 (2d Cir. 1967), cert. denied, 393 U.S. 836 (1968) (*Stevens II*); *J. P. Stevens & Co.*, 167 N.L.R.B. 266 (1967), and *J. P. Stevens & Co.*, 167 N.L.R.B. 258 (1967), enforced with modifications, 406 F. 2d 1017 (4th Cir. 1968) (*Stevens III* and *IV*); *J. P. Stevens & Co.* (*Dublin-Nathaniel Plants*), 171 N.L.R.B. 1202 (1968), enforced, 417 F. 2d 533 (5th Cir. 1969) (*Stevens V*); *The Black Hawk Corp.*, 177 N.L.R.B. 944 (1969), enforced in part, 431 F. 2d 900 (4th Cir. 1970) (*Stevens VI*); *J. P. Stevens & Co., Gulistan Division*, 179 N.L.R.B. 254 (1969), enforced, 441 F. 2d 514 (5th Cir.), cert. denied, 404 U.S. 830 (1971) (*Stevens VII*); *J. P. Stevens & Co.*, 181 N.L.R.B. 666 (1970), enforced in part, 449 F. 2d 595 (4th Cir. 1971) (*Stevens VIII*); *J. P. Stevens & Co.*, 183 N.L.R.B. 25 (1970), enforced, 461 F. 2d 490 (4th Cir. 1972) (*Stevens IX*); *The Black Hawk Corp.*, 183 N.L.R.B. 267 (1970) (*Stevens X*); *J. P. Stevens & Co., Gulistan Division*, 186 N.L.R.B. 180 (1970), enforced, 455 F. 2d 607 (5th Cir. 1971) (*Stevens XI*); *J. P. Stevens & Co.*, 190 N.L.R.B. 751 (1971), remanded for reconsideration of additional remedies, 475 F. 2d 973 (D.C. Cir.), on remand, 205 N.L.R.B. 1032 (1973) (*Stevens XII*); *NLRB* v. *J. P. Stevens & Co.*, 464 F. 2d 1326 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973) (contempt) (*Stevens XIII*); *J. P. Stevens & Co.*, 217 N.L.R.B. 513 (1975) and *J. P. Stevens & Co.*, 219 N.L.R.B. 850 (1975), enforced, 547 F. 2d 792 (4th Cir. 1976) (*Stevens XIV and XV*); *J. P. Stevens & Co.*, 220 N.L.R.B. 270 (1975) (*Stevens XVI*); *NLRB* v. *J. P. Stevens & Co.*, 538 F. 2d 1152 (5th Cir. 1976) (contempt) (*Stevens XVII*); *NLRB* v. *J. P. Stevens & Co.*, 563 F. 2d 8 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (contempt) (*Stevens XVIII*).

under court orders" (Pet. 8). Therefore, petitioner argues, in framing a remedy for the present violations, the Board is not entitled to take into account petitioner's past misconduct. The fact is, however, that petitioner's " 'program of experimentation with disobedience of the law' " (*Stevens XVIII*, *supra*, 563 F. 2d at 22, quoting from *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949)), has not ceased. Since 1977, the Board has issued orders against petitioner in seven additional cases, including the order here, finding violations of the Act at seven different locations.[8] Accordingly, although petitioner has not been charged with contempt since 1977, it is clear that petitioner continues to violate the Act.

In view of this history and the fact that petitioner's policies are "not determined at individual plant levels alone" (*J. P. Stevens & Co.* v. *NLRB*, 380 F. 2d 292, 304 (2d Cir. 1967) (*Stevens I*)), the Board reasonably concluded that petitioner's unlawful threats and interrogations during the union campaign at its Tifton, Georgia plant evidenced a continuation of its policy of violating the Act and also that news of these latest violations would likely inhibit employees at other plants in the exercise of their organizational rights.[9] The corporate-wide union access

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[8] *J. P. Stevens & Co.*, 239 N.L.R.B. No. 95 (Dec. 12, 1978), enforcement pending, Nos. 79-1247 and 79-1254 (4th Cir.) (*Stevens XIX*); *J. P. Stevens & Co.*, 240 N.L.R.B. No. 35 (Jan. 23, 1979), enforced, 612 F. 2d 881 (4th Cir. 1980) (*Stevens XX*); *J. P. Stevens & Co.*, 240 N.L.R.B. No. 75 (Feb. 6, 1979), enforced, No. 79-1101 (4th Cir. Feb. 22, 1980) (*Stevens XXI*); *J. P. Stevens & Co.*, 243 N.L.R.B. No. 159 (Aug. 2, 1979), enforcement pending, No. 79-1456 (4th Cir.) (*Stevens XXII*); *J. P. Stevens & Co.*, 244 N.L.R.B. No. 82 (Aug. 20, 1979), enforcement pending, No. 79-1502 (4th Cir.) (*Stevens XXIII*); *J. P. Stevens & Co.*, 245 N.L.R.B. No. 20 (Sept. 24, 1979), enforcement pending, Nos. 79-1624 and 79-1754 (4th Cir.) (*Stevens XXIV*); *J. P. Stevens & Co.*, 247 N.L.R.B. No. 44 (Jan 21, 1980), enforcement pending, No. 80-1058 (5th Cir.) (*Stevens XXV*).

[9] When the Board fashioned its remedy in this case (involving the Tifton, Georgia plant), *Stevens XXI* through *XXV*, which involve violations in plants in Massachusetts, Alabama, Virginia, and North Carolina, were pending before the Board.

remedy is designed to ameliorate this undesirable effect by facilitating communications between employees and the Union and adding a note of legitimacy to the employees' organizational activities. "On the surface, this may appear to be making the lot of the Union easier. But, it is being made easier solely because the employer has made that lot *harder* than the law tolerates." *Stevens I*, *supra*, 417 F. 2d at 541 (emphasis in original).

2. Relying on *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), petitioner argues (Pet. 10-11) that the Board's access remedies are improper in the circumstances presented here. But *Babcock & Wilcox Co.* held only that an employer, who had not otherwise violated the Act, did not commit an unfair labor practice by denying union organizers access to company property where the organizers had reasonable alternative means of communicating with employees. 351 U.S. at 109-114. Here, in contrast, the issue is whether the Board has reasonably permitted restricted union access as a remedy for repeated unfair labor practices. As the Sixth Circuit has explained in enforcing such an access remedy (*Decaturville Sportswear Co.* v. *NLRB*, 406 F. 2d 886, 889 (1969)):

> [T]he question [in *Babcock & Wilcox Co.*] was whether denial of access to company property in order to distribute union literature constituted an unfair labor practice and the Supreme Court held it did not. Here, the question is whether reasonable access to company property for a limited time is an appropriate remedial measure after a finding of unfair labor practices. The two questions involve different considerations.

Moreover, contrary to petitioner's assertion (Pet. 13), the courts of appeals have consistently enforced Board orders and fashioned contempt decrees requiring union access where, as here, such remedies are necessary to eradicate the effects of unfair labor practices. See, *e.g.*, *NLRB* v. *Crown Laundry & Dry Cleaners, Inc.*, 437 F. 2d 290, 294 (5th Cir.

1971); *Stevens V*, *supra*, 417 F. 2d at 540; *Decaturville Sportswear Co.* v. *NLRB*, *supra*, 406 F. 2d at 899; *J. P. Stevens & Co.* v. *NLRB*, 406 F. 2d 1017, 1021-1022 (4th Cir. 1968) (*Stevens III* and *IV*); *Int'l Union of Electrical, Radio and Machine Workers* v. *NLRB*, 383 F. 2d 230, 232 n.4 (D.C. Cir. 1967), cert. denied, 390 U.S. 904 (1968); *NLRB* v. *H.W. Elson Bottling Co.*, 379 F. 2d 223, 226 (6th Cir. 1967).[10] In fact, the access order in this case merely extends to all petitioner's plants the same access provisions that the Second Circuit, in *Stevens XVIII*, applied to every plant operated by petitioner in North and South Carolina. See 563 F. 2d at 24-25. The Second Circuit there found that such remedies were necessary to " 'dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign.' " *Id.* at 24 (quoting *Textile Workers of America* v. *NLRB*, 388 F. 2d 896, 906 (2d Cir. 1967) (*Stevens II*)). Here, as in *Stevens XVIII*, the limited access remedy is an appropriate remedy "to reduce this atmosphere of fear." 563 F. 2d at 25.[11]

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[10]Petitioner erroneously suggests (Pet. 9-10, 13) that the Fifth Circuit in *Florida Steel Corp.* v. *NLRB*, 587 F. 2d 735 (1979), disapproved an "access" remedy. In that case, however, the court of appeals found that substantial evidence did not support the Board's conclusion that the employer had violated Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act. Accordingly, the court did "not reach nor decide * * * the correctness of the company-wide broad form of order issued by the Board." 587 F. 2d at 754. Similarly, petitioner's reliance (Pet. 15) on *J. P. Stevens & Co.*, 243 N.L.R.B. No. 159 (Aug. 2, 1979) (*Stevens XXII*), is misplaced. In that case, the Board denied "a prospective bargaining order covering future bargaining requests anywhere in [petitioner's] enterprise" and not, as petitioner alleges, an access order such as that at issue here.

[11]Petitioner seeks (Pet. 14 n.12) to distinguish *Stevens XVIII* on the ground that the virtually identical access remedy imposed there was based on the contempt power and not the Board's remedial powers. But both civil contempt decrees and Board orders issued under Section 10(c) are remedial in nature. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911); *Stevens XVIII*, *supra*, 563 F. 2d at 21-22. Furthermore, even if a court's civil contempt power may in some way exceed the Board's power, the courts of appeals have repeatedly approved access

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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orders as appropriate Board remedial measures. See, *e.g.*, *Stevens III and IV*, *supra*; *Stevens V*, *supra*; *Int'l Union of Electrical, Radio and Machine Workers* v. *NLRB*, *supra*; *NLRB* v. *H.W. Elson Bottling Co.*, *supra*; *Montgomery Ward & Co.* v. *NLRB*, 339 F. 2d 889, 894 (6th Cir. 1965).

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